QUESTION PRESENTED

Whether the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980 are valid under the Taking Clause of the Fifth Amendment to the Constitution.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

Nos. 84-1555 & 84-1567

JOHN L. CONNOLLY, et al., each in his respective capacity as Trustee of the OPERATING ENGINEERS PENSION TRUST,
Appellants,

v.

PENSION BENEFIT GUARANTY CORPORATION,
Appellee.

WOODWARD SAND CO., INC.,
Appellant,

v.

PENSION BENEFIT GUARANTY CORPORATION,
Appellee.

On Appeal from the United States District Court for the Central District of California

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BRIEF FOR THE APPELLEE

OPINION BELOW

The opinion of the three-judge panel of the District Court for the Central District of California is printed at pages 104-118 of the Joint Appendix (hereinafter "J. App.").

JURISDICTION

These are appeals from a judgment entered by a three-judge court on December 4, 1984. J. App. 119-121. Timely notices of appeal to this Court were filed by appellants

Connolly, *et al.* (hereinafter the "Trustees") on January 31 and March 20, 1985, and by appellant Woodward Sand Company, Inc. ("Woodward") on January 31, 1985. J. App. 122-124. Jurisdiction is based on 28 U.S.C. § 1253 and former 28 U.S.C. § 2282 (repealed by Pub. L. No. 94-381, 90 Stat. 1119, but applicable to "any action commenced on or before [August 12, 1976]," 28 U.S.C. § 2282 note). The original complaint in this case, filed on June 17, 1975, sought, *inter alia*, an injunction on constitutional grounds against the enforcement of the pension insurance premium provisions of the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829, 29 U.S.C. §§ 1001 *et seq.* (hereinafter "ERISA"). J. App. iii, 1-8. Although issues raised in these appeals relate to statutory amendments that were not enacted until 1980, and the complaint raising these issues was not filed until 1982, all questions presented do arise in an action "commenced on or before" August 12, 1976. *See* pp. 13-15 & n.13, *infra*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The relevant portions of the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208-1311 (hereinafter the "Multiemployer Act"), appear at 29 U.S.C. §§ 1306, 1307, and 1381-1405 (1982). The provisions challenged by appellants are printed in the Trustees' Jurisdictional Statement at pages 4-5.

STATEMENT

These consolidated appeals present a facial challenge under the Taking Clause of the Fifth Amendment to certain provisions of the Multiemployer Act—the so-called "withdrawal liability" provisions—that obligate certain employers that withdraw from multiemployer pension plans to pay their proportionate shares of the plans' unfunded vested benefits. 29 U.S.C. §§ 1381-1405 (1982).[1] Last year, in *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 104 S. Ct. 2709 (1984), this Court unanimously held that retroactive application of these provisions did not violate the Due Process Clause of the Fifth Amendment. The Court in *Gray* "assume[d] . . . that the prospective effects of the Act satisfy constitutional standards." *Id.* at 2717 n.7. The three-judge court in this case unanimously held that they did, and, as this Court noted in *Gray*, every court of appeals that has considered the question has agreed.[2] The appellants now

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[1] A multiemployer plan is defined as a plan to which more than one employer is required to contribute, which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer, and which satisfies such other requirements as the Secretary of Labor may prescribe by regulation. 29 U.S.C. § 1301(a)(3) (1982). Approximately two thousand such plans provide pension coverage to eight million American workers and their families.

[2] Since this Court's decision in *Gray*, the Court has denied certiorari in four cases in which courts of appeals rejected challenges to the constitutionality of the Multiemployer Act's prospective operation. *Peick v. Pension Benefit Guaranty Corp.*, 724 F.2d 1247 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 3554 (1984); *Republic Industries, Inc. v. Teamsters Joint Council*, 718 F.2d 628 (4th Cir. 1983), *cert. denied*, 104 S. Ct. 3553 (1984); *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 725 F.2d 843 (2d Cir.), *cert. denied*, 104 S. Ct. 3554 (1984); *Board of Trustees of Western Conference of Teamsters Pension Trust Fund v. Thompson Building Materials, Inc.*, 749 F.2d 1396 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 2116 (1985). The Act's prospective operation has also been upheld in *Keith Fulton & Sons v. New England*

urge this Court to overrule those decisions and hold that on their face the withdrawal liability provisions of the Multiemployer Act violate the Fifth Amendment guarantee that "private property [shall not] be taken for public use, without just compensation."

A. Congress Acts to Protect Employees' Pension Benefits.

In 1974 Congress enacted ERISA to provide comprehensive regulation for private pension plans. In addition to prescribing standards for the funding, management, and benefit provisions of private pension plans, ERISA established a system of pension benefit insurance. Substantial public concern had been expressed over tragedies suffered by thousands of American workers, whose expectations of receiving promised pensions had been shattered by the insufficient funding of their pension plans. *See, e.g.*, 1 Legislative History of the Employee Retirement Income Security Act of 1974 (1976) 212-214 (Sen. Bentsen). As a result, a "principal purpose[] of this 'comprehensive and reticulated statute' was to ensure that employees and their beneficiaries would not be deprived of anticipated retirement benefits by the termination of pension plans before sufficient funds have been accumulated in the plans . . . . Congress wanted to guarantee that 'if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he will actually receive it.'" *Gray*, 104 S. Ct. at 2713 (quoting *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361-62, 374-75 (1980)).

Teamsters, 762 F.2d 1124 (1st Cir. 1984), *modified on other grounds*, 762 F.2d 1137 (1st Cir. 1985) (en banc); *Terson Co. v. Bakery Drivers & Salesmen Local 194*, 739 F.2d 118 (3d Cir. 1984); and *Washington Star Co. v. International Typographical Union Negotiated Pension Plan*, 729 F.2d 1502 (D.C. Cir. 1984). In *Peick*, *Republic Industries*, *Thompson*, *Keith Fulton*, and *Terson*, the Taking Clause claim raised by these appeals was directly at issue.

To achieve this goal of protecting "anticipated retirement benefits," Congress created appellee Pension Benefit Guaranty Corporation ("PBGC"), a wholly-owned government corporation, to administer a program of insurance for participants in both single-employer and multiemployer pension plans. 29 U.S.C. § 1302(a) (1976). For single-employer plans, ERISA immediately obligated the PBGC to pay the statutorily guaranteed benefits whenever a covered plan terminated. *Id.* §§ 1361, 1381. To finance the single-employer insurance program, the PBGC was authorized to collect premiums from all covered plans. *Id.* § 1306. It was also required to collect any shortfall from any employer that terminated a plan, up to 30 percent of the employer's net worth. *Id.* § 1362(b).

With respect to multiemployer plans, ERISA delayed mandatory payment of guaranteed benefits until January 1, 1978. Until that date, Congress vested the PBGC with discretionary authority to pay benefits upon the termination of multiemployer pension plans. *Id.* § 1381(c)(2)-(4). As with single-employer plans, all contributors to covered multiemployer plans were assessed insurance premiums payable to the PBGC. *Id.* § 1306(a)(3)(B). If, upon a plan termination, the PBGC exercised its discretion to pay benefits, all employers that had contributed to the plan during the five years preceding its termination were liable to the PBGC in amounts proportional to their shares of the plan's contributions during that period, subject to the 30 percent limitation. *Id.* § 1364.

Thus, after the enactment of ERISA in 1974, employers were on notice that if they withdrew from an underfunded multiemployer plan they had a contingent liability which depended upon whether the plan survived the next five years and on whether the PBGC assumed discretionary responsibility to pay the plan's guaranteed benefits. *See Gray*, 104 S. Ct. at 2713.

B. Congress Scrutinizes the Multiemployer Pension Benefit Insurance Program.

During the years between 1974, when ERISA was passed, and 1978, when mandatory multiemployer guarantees were due to go into effect, several multiemployer plans terminated, and the PBGC extended coverage to thousands of participants. "Congress became concerned that a significant number of plans were experiencing extreme financial hardship," *Gray*, 104 S. Ct. at 2713-14, and that implementation of mandatory guarantees for multiemployer plans might induce several large multiemployer plans to terminate, subjecting the insurance system to a liability that would have "an adverse impact on the entire private pension system." 123 Cong. Rec. S18637 (daily ed. Nov. 3, 1977) (Sen. Bentsen); *see also* 126 Cong. Rec. S10099 (daily ed. July 29, 1980) (Sen. Javits).

As a result, Congress acted to delay the effective date for the mandatory guarantees for 18 months, Pub. L. No. 95-214, 91 Stat. 1501 (Dec. 19, 1977), and it directed the PBGC to prepare a comprehensive report analyzing the problems of multiemployer plans and recommending solutions. *See* S. Rep. No. 95-570, 95th Cong., 1st Sess. 1-4, *reprinted in* 1977 U.S. Code Cong. & Ad. News 4128-4131; H.R. Rep. No. 95-706 at 1 (1977). "In this way," this Court explained in *Gray*, "Congress created 'time to legislate, if necessary, before the mandatory coverage [came] into effect.'" 104 S. Ct. at 2714 (quoting 123 Cong. Rec. 36800 (1977) (Sen. Williams)).

The PBGC's report, issued on July 1, 1978, found, among other things, "that ERISA did not adequately protect plans from the adverse consequences that resulted when individual employers terminate their participation in, or withdraw from, multiemployer plans." *Gray*, 104 S. Ct. at 2714.[3] The "basic problem," the report found,

[3] The inadequacy of existing law was dramatically demonstrated by the report's finding that about ten percent of all multiemployer

was the threat to the solvency and stability of multiemployer plans caused by employer withdrawals, which existing law actually encouraged. *Id.*; PBGC Study at 4, 24, 49, 51-52, 96-97; *House Labor Hearings* at 1158, 1178, 1203, 1205-06, 1248-49.[4] As the PBGC's Executive Director explained (*Pension Plan Termination Issues: Hearing Before the Subcommittee on Oversight of the House Committee on Ways and Means*, 95th Cong., 2d Sess. 22 (1978) (*"1978 Hearings"*)):

> A key problem of ongoing multiemployer plans, especially in declining industries, is the problem of

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plans, covering 1.3 million participants, were experiencing financial difficulties that could result in plan terminations before 1988. Pension Benefit Guaranty Corporation—Multiemployer Study required by P.L. 95-214—July 1, 1978 (hereinafter "PBGC Study") at 1, 138; *Hearings on the Multiemployer Pension Plan Amendments Act of 1979 before the Task Force on Welfare and Pension Plans of the Subcommittee on Labor-Management Relations of the Committee on Education and Labor, House of Representatives*, 96th Cong., 1st Sess. 1155, 1290 (1980) (*"House Labor Hearings"*). Funding of all plan benefits under these plans, if they terminated, would cost the insurance system approximately 4.8 billion dollars and necessitate an increase in premiums to unacceptable levels. PBGC Study at 2, 16, 139; *House Labor Hearings* at 1156, 1170, 1291. The House Education and Labor Committee concluded that "the corporation's report clearly demonstrates that . . . the magnitude of the risk and the potential exposure of the system are intolerably high." H.R. Rep. No. 96-869, Part I, 96th Cong., 2d Sess. 57 (*"House Labor Report"*), *reprinted in* 1980 U.S. Code Cong. & Ad. News 2952.

[4] Even ERISA's limitation of an employer's liability to 30 percent of its "net worth," 29 U.S.C. § 1362(b)(2) (1976), was found to be an incentive for employers to terminate their plans rather than to continue funding them. *See* PBGC Study 51; *House Labor Hearings* 1205; 126 Cong. Rec. S11668 (daily ed. Aug. 26, 1980) (Sen. Javits); *cf.* Report to the Congress by the Comptroller General of the United States, *Legislative Changes Needed to Financially Strengthen Single Employer Pension Plan Insurance Program*, GAO/HRD-84-5 (*"Single-Employer Report"*) 42-44 (Nov. 14, 1983) (Appendix to this Brief ("App.") 2a-5a) (30 percent net-worth limitation enables employers to "take advantage of" the single-employer insurance system).

> employer withdrawal. Employer withdrawals reduce a plan's contribution base. This pushes the contribution rate for remaining employers to higher and higher levels in order to fund past service liabilities, including liabilities generated by employers no longer participating in the plan, so-called inherited liabilities. The rising costs may encourage—or force—further withdrawals, thereby increasing the inherited liabilities to be funded by an ever-decreasing contribution base. This vicious downward spiral may continue until it is no longer reasonable or possible for the pension plan to continue.

To remedy or at least alleviate the problems caused by employer withdrawals, the PBGC proposed that withdrawing employers be required to complete funding their shares of the plans' unfunded vested liabilities. PBGC Study at 97-114; *House Labor Hearings* at 1249-66. Again, the PBGC's Executive Director explained (*1978 Hearings* at 23):

> To deal with this problem, our report considers an approach under which an employer withdrawing from a multiemployer plan would be required to complete funding its fair share of the plan's unfunded liabilities. In other words, the plan would have a claim against the employer for the inherited liabilities which would otherwise fall upon the remaining employers as a result of the withdrawal. . . .
>
> We think that such withdrawal liability would, first of all, discourage voluntary withdrawals and curtail the current incentives to flee the plan. Where such withdrawals nonetheless occur, we think that withdrawal liability would cushion the financial impact on the plan.

The PBGC's proposal was included in policy recommendations submitted to Congress in early 1979 and incorporated in proposed legislation sent by the White House to Congress a few months later. 126 Cong. Rec. S10099 (daily ed. July 29, 1980) (Sen. Javits); S. 1076, 96th Cong., 1st Sess. (1979).

C. Congress Enacts the Multiemployer Act.

Congress scrutinized and debated the issue of withdrawal liability for the next 17 months. Four congressional committees held hearings on the Administration's bill, and many witnesses testified.[5] Four times Congress deferred the effective date for the commencement of mandatory insurance coverage of multiemployer plans.[6] "On each occasion," this Court has observed, *Gray*, 104 S. Ct. at 2714 n.1, "Congress was providing more time for thorough consideration of the complex issues posed by the termination of multiemployer pension plans."

After painstaking consideration, Congress agreed that the existing law, by providing undesirable incentives for employer withdrawal and leaving plans with inadequate means for funding their existing obligations, posed a serious threat to the benefit security of multiemployer plan participants. The absence of effective withdrawal liability permitted an employer to "withdraw from a plan leaving unfunded benefit obligations for his employees

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[5] *House Labor Hearings, supra*; *Multiemployer Pension Plan Amendments Act of 1979: Hearings Before the Committee on Labor and Human Resources, United States Senate*, 96th Cong., 1st Sess. (1979); *Pension Plan Termination Insurance for Multiemployer Pension Plans, Hearing Before the Subcommittee on Private Pension Plans and Employee Fringe Benefits of the Committee on Finance, United States Senate*, 96th Cong., 2d Sess. (1980) (*"Senate Finance Hearing"*); *Multiemployer Pension Plan Termination Insurance Program: Hearing Before the Subcommittee on Oversight of the Committee on Ways and Means, House of Representatives*, 96th Cong., 1st Sess. (1979); *The Multiemployer Pension Plan Amendments Act of 1979: Hearing Before the Committee on Ways and Means, House of Representatives*, 96th Cong., 2d Sess. (1980).

[6] *See* Pub. L. No. 95-214, 91 Stat. 1501 (Dec. 19, 1977) (extending date through June 30, 1979); Pub. L. No. 96-24, 93 Stat. 70 (June 19, 1979) (extending to May 1, 1980); Pub. L. No. 96-239, 94 Stat. 341 (Apr. 30, 1980) (extending to July 1, 1980); Pub. L. No. 96-293, 94 Stat. 610 (June 30, 1980) (extending to August 1, 1980).

which must be paid by the remaining employers in the plan," and encouraged a " 'last man out' mentality, with employers withdrawing from plans to avoid possible plan termination liability." 126 Cong. Rec. S10100 (daily ed. July 29, 1980) (Sen. Javits).

Congress recognized that the imposition of withdrawal liability would displace certain provisions of agreements reached in collective bargaining.[7] Nevertheless, in the end, Congress decided that there was no acceptable alternative to the Multiemployer Act. A principal committee report announced:

> [T]he committee has concluded that to let the current law become mandatory or to eliminate the guarantee program would create economic havoc and do serious harm to active workers and retirees in, and employers contributing to, multiemployer plans.

House Labor Report 63-64, 1980 U.S. Code Cong. & Ad. News 2932; *see* 29 U.S.C. § 1001a(a)(4) (1982).

On May 22, 1980, the House passed its version of the bill by a vote of 374-0. 126 Cong. Rec. H4170 (daily ed.). Two months later the Senate passed its version by a vote of 85-1. 126 Cong. Rec. S10169 (daily ed. July 29, 1980). On September 26, 1980, the President signed the Multiemployer Act into law.[8]

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[7] "Multiemployer plans are creatures of collective bargaining. The [House Committee on Education and Labor] believes that the integrity of the collective bargaining process must be preserved to the utmost extent consistent with assuring the financial soundness of multiemployer plans to meet benefit commitments. The bill as reported out by the committee represents an effort to strike an appropriate balance among conflicting interests and needs." *House Labor Report* 63; 1980 U.S. Code Cong. & Ad. News 2931.

[8] The Act as originally enacted contained a retroactive effective date of April 29, 1980, which this Court held constitutional in *Gray*. On July 18, 1984, the President signed into law the Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494. Section 558(a) of that Act changes the effective date of the Multiemployer Act's withdrawal liability provisions to September 26, 1980, the date of its initial enactment.

D. Withdrawal Liability Is the Cornerstone of a Complex and Integrated Statute.

Withdrawal liability is the most important element in Congress' 1980 statutory plan to protect and strengthen multiemployer pension plans. The concept is straightforward. As *Gray* explains, 104 S. Ct. at 2715, withdrawal liability under the Act

> requires that an employer withdrawing from a multiemployer pension plan pay a fixed and certain debt to the pension plan. This withdrawal liability is the employer's proportionate share of the plan's "unfunded vested benefits," calculated as the difference between the present value of vested benefits and the current value of the plan's assets.

As intended by Congress, withdrawal liability removes incentives for employers to withdraw from plans facing actual or potential financial difficulties; it assures new employers contemplating entry into a multiemployer plan that they will not be assuming vast obligations incurred by the plan prior to their entry; and it ensures that the withdrawing employer will, in effect, continue to fund a share of the plan obligations incurred during its association with the plan, rather than shift those obligations to the remaining employers or to the PBGC.[9] Withdrawal

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[9] Because of the unfairness of the previous system, under which withdrawing employers could shift their funding responsibilities to remaining employers, several employer associations testified in support of withdrawal liability. *See, e.g., Senate Finance Hearing* 155 (National Construction Employers Council); *id.* 215 (Food Marketing Institute); *id.* 281 (Bituminous Coal Operators Association). And contrary to the position they take in this Court, amicus National Association of Manufacturers ("NAM") supported a House rule whose purpose was to facilitate the passage of the Multiemployer Act. 126 Cong. Rec. H7864 (daily ed. Aug. 26, 1980) (Rep. Thompson). *See also* Pension Rep. (BNA) A-22 (Mar. 21, 1980) (App. 6a). Amicus American Trucking Associations ("ATA") similarly participated in the legislative process that led to the enactment of the Multiemployer Act, and initially appeared satisfied with its efforts: "The Senate Finance Committee last week

liability thus promotes plan continuation, protects new plan entrants, and secures the insurance system.

However, withdrawal liability is only one facet of a delicately structured statute that seeks "to strike an appropriate balance among conflicting interests and needs." *House Labor Report* 63, 1980 U.S. Code Cong. & Ad. News 2931. Congress tempered imposition of withdrawal liability with numerous provisions moderating its impact on withdrawing employers [10] and imposed other burdens on plan participants, remaining employers, and PBGC premium payers.[11] As one court aptly noted, "Con-

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completed markup of the ERISA Multi-Employer Plans Amendments Act, S. 1076. The changes we [the ATA] had sought in the bill were adopted, with some modifications." *Truck Line* No. 32, at 1 (June 16, 1980) (App. 7a).

[10] *See* pp. 32-36, *infra*.

[11] In addition to withdrawal liability, the Multiemployer Act effects the following major changes in ERISA:

(a) The PBGC is required to guarantee the payment of certain pension benefits, but at a level below that guaranteed for terminations prior to the enactment of the Multiemployer Act. 29 U.S.C. §§ 1322a, 1322b. The reduction of guaranteed benefits to levels below what a plan has promised to pay acts as an incentive for employees and their bargaining representatives to ensure that the plan is funded and administered in a manner that would provide full benefits, rather than to rely on plan termination and the PBGC guarantee.

(b) The PBGC is authorized to provide financial assistance to multiemployer plans which are unable to meet their current financial obligations to pay guaranteed benefits. This provision permits a plan which is experiencing financial difficulty to continue, rather than be compelled to terminate or to demand excessive contributions from remaining employers. It therefore allows employers to continue making reasonable contributions to an insolvent plan, without incurring liability under ERISA. *Id.* § 1431.

(c) Plan sponsors are authorized to contain costs by reducing benefits in certain circumstances, and sponsors of insolvent plans are required to suspend benefit payments when funds are not

gress thus spread the pain around." *Peick v. Pension Benefit Guaranty Corp.*, 539 F. Supp. 1025, 1052 (N.D. Ill. 1982), *aff'd*, 724 F.2d 1247 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 3554 (1984).

E. The Proceedings Below.

The procedural history of this case predates passage of the Multiemployer Act. On June 17, 1975, the appellant Trustees filed this suit, seeking injunctive relief and a declaratory judgment that the pension plan in this case is a "defined contribution plan" within the meaning of ERISA and thus is not subject to the coverage or authority of the PBGC.[12] Alternatively, the Trustees contended, if the plan was subject to the provisions of ERISA requiring premium payments and imposing contingent termination liability, ERISA on its face was unconstitutional because it deprived the Trustees, the employers, and the plan participants of their "just and lawful property without due process of law and without just and adequate compensation." J. App. 7-8.

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available. (However, benefits may not be suspended or reduced below the guaranteed level.) *Id.* §§ 1425, 1426.

(d) The benefits provided by multiemployer plans are to be funded over a shorter period of time. More realistic funding of a plan's commitments protects the insurance system as well as participant interests and controls the exposure of contributing employers. 26 U.S.C. § 412; 29 U.S.C. § 1082.

(e) The annual per capita premium paid by covered multiemployer plans was raised from $.50 to $1.40. Further increases are scheduled to raise the premium to $2.60 over a nine-year period. *Id.* § 1306.

[12] A "defined contribution plan" is "a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account." 29 U.S.C. § 1002(34).

The district court agreed that the Trust was a "defined contribution plan" and enjoined the PBGC from treating it otherwise. J. App. 42, 51-52. The Ninth Circuit reversed and remanded for consideration of the constitutional issues. *Connolly v. Pension Benefit Guaranty Corp.*, 581 F.2d 729 (9th Cir.), *cert. denied*, 440 U.S. 935 (1978). On remand, the Trustees moved to convene a three-judge court to hear the constitutional claims. The district court, however, concluded that the Trustees' constitutional challenges were "insubstantial" and denied the motion. J. App. 55-56. The Trustees petitioned for a writ of mandamus on the issue, but their petition was denied by both the Ninth Circuit and this Court. *Connolly v. Williams*, No. 79-7580 (9th Cir., Jan. 14, 1980); *Connolly v. United States District Court*, 445 U.S. 959 (1980).

On the merits, the district court granted summary judgment to the PBGC. J. App. 60. On appeal, however, the Ninth Circuit could not agree that the constitutional claims were so "insubstantial" that a three-judge court could be summarily denied. The case was remanded with directions to convene a three-judge court. *Connolly v. Pension Benefit Guaranty Corp.*, 673 F.2d 1110, 1114 (9th Cir. 1982).

By this time, however, the Multiemployer Act had superseded the provisions of ERISA governing multiemployer plans. Consequently, on July 26, 1982, the Trustees moved to amend their complaint to include a challenge to the constitutionality of the withdrawal liability and premium provisions enacted in 1980. The PBGC argued that it was anomalous to permit a constitutional challenge to a statute enacted in 1980 under the three-judge court requirement repealed in 1976, and that to do so would frustrate the congressional effort to reduce the burden on lower courts as well as this Court's mandatory docket. The PBGC therefore opposed the motion.[13] The

[13] The PBGC also challenged the filing of the amended complaint on the grounds that the Trustees, who do not pay withdrawal liabil-

district court, however, permitted the amendment. It also permitted, over the PBGC's objection, intervention in the case by four employers, including appellant Woodward, that had been assessed withdrawal liability by the Trustees. The PBGC contended that the employers were abusing the vestigial three-judge statute and that permitting them to argue the particular facts of each of their cases would greatly expand the scope of this case and impose new and unnecessary burdens on the district court and on this Court. The district court addressed this concern by granting intervention only "on the condition that [the employers] do not litigate beyond the scope of plaintiffs' First Amended Complaint." J. App. 87. The case thus remained a challenge to the statute on its face.

On May 1, 1984, the three-judge court granted summary judgment in favor of the PBGC "as to all of plaintiffs' and intervenors' facial constitutional challenges." J. App. 117. The court emphasized that "[w]e do not, however, resolve the constitutionality of the statutes as applied to particular parties." J. App. 117-118.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Multiemployer Act requires certain employers that withdraw from multiemployer plans "to compensate [the] pension plan for benefits that have already vested with the employees at the time of the employer's withdrawal." *Gray*, 104 S. Ct. at 2720. The central issue on these appeals, as presented in the Jurisdictional Statements and briefs of both appellants, is whether this statutory imposition of liability upon employers constitutes a "taking"

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ity, lacked standing to challenge the constitutionality of its assessment, and also that 29 U.S.C. § 1451(a)(2) proscribes actions relating to withdrawal liability against the PBGC. *Cf. Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 98 n.2 (1978) (Rehnquist, J., concurring).

of private property without just compensation in violation of the Fifth Amendment.

We note first the peculiarity and inappropriateness of characterizing as a governmental "taking" a statutory allocation of monetary liability as between two private parties. The essence of legislation is the apportionment of rights and duties, including "the burdens and benefits of economic life, *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976), among members of organized society. Legislation that makes *A* liable to *B* for consequences of *A*'s conduct has never been thought to implicate the Taking Clause. The constitutional validity of such legislation depends only on the rationality of the legislative judgment that *A* should bear the actual or estimated loss resulting from his conduct. *Id.*

Even if the statutory withdrawal liability provisions are tested under the standards applied by this Court in recent Taking Clause decisions, they easily pass constitutional muster. The character of the governmental action involved in this case is wholly unlike the "physical invasion" that is the hallmark of a governmental "taking" by eminent domain. All that the Multiemployer Act does is authorize a private party (a pension plan) to make a monetary claim against another private party (an employer) because of the potential harm that the former may suffer as a result of the latter's act of withdrawal. Nor has any significant "economic impact" of the statute been shown here. In view of the fact that these appeals present a purely facial challenge to the Act, it is impossible for appellants to argue that the Act regulates them "too far [so that] it will be recognized as a taking." And, in light of the enactment of ERISA in 1974 and the many months of legislative debate before the Multiemployer Act was adopted, employers who are affected if they withdraw from a pension plan *after* enactment of the law cannot seriously argue that they have been unfairly deprived of "reasonable investment-backed expectations."

Consequently, whether one judges an employer's withdrawal liability in light of the three distinct factors enunciated in this Court's recent decisions, or whether one undertakes an "ad hoc, factual inquiry" to determine whether regulation has gone "too far" to be characterized as anything other than a taking, the result is the same: The liability provisions of the Multiemployer Act do not violate the Taking Clause of the Fifth Amendment.

Nor is the Due Process Clause infringed by the remedy Congress selected to deal with the problem of the shattered expectations of American workers whose pension plans had insufficient assets to pay vested benefits. To ensure that the solvency and stability of multiemployer plans would not be jeopardized by employer withdrawals, Congress empowered plan trustees to assess withdrawing employers their fair shares of a plan's unfunded benefit obligations. The reason for imposing such liability and the means chosen by Congress to effectuate that purpose amply satisfy constitutional standards.

ARGUMENT

I. CONGRESS IS NOT "TAKING" PRIVATE PROPERTY FOR PUBLIC USE WHEN IT CONFERS UPON A PRIVATE PARTY A LEGAL RIGHT TO COLLECT A MONEY JUDGMENT FOR HARM CAUSED OR RISK CREATED BY THE CONDUCT OF ANOTHER PRIVATE PARTY.

The principal statutory provision at issue makes certain withdrawing employers liable to multiemployer pension plans for their allocable shares of the plans' unfunded vested benefits. Congress has merely established a legal right for one private party (the pension plan) to recover from a second private party (the employer) for the estimated amount of the potential harm (inability to pay vested benefits) caused by the second party's act (withdrawal).

It is unusual, to say the least, for such a statutory provision to be challenged under the Taking Clause of the

Fifth Amendment. Legislation routinely defines rights and privileges of private parties in an organized society. Laws grant rights to some individuals and correlatively assign duties or liabilities to others. If a legislature declares that coal mine operators are to be absolutely liable for coal workers' pneumoconiosis, 30 U.S.C. § 901 *et seq.*, or if it imposes treble-damage liability for business acts in restraint of trade, § 15 U.S.C. § 15, the legislature is authorizing a court to take money from one private party and give it to another. This is the common stuff of legislation "adjusting the benefits and burdens of economic life" (*Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978)), and it has never been thought that government is obliged, under the Taking Clause, to repay from the public treasury the party who bears newly created statutory liabilities.[14]

The appellants' Taking Clause claim is not strengthened by the fact that, prior to the imposition of withdrawal liability, their relationship was governed by a private contractual obligation, under which specified

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[14] We agree with the appellants that no Tucker Act remedy is available to them. Congress clearly stated its intention that no public funds be expended in support of the guarantee program: "It is hereby declared to be the policy of this Act . . . to provide a financially self-sufficient program for the guarantee of employee benefits under multiemployer plans." 29 U.S.C. § 1001a(c)(4). Moreover, it would be irrational for Congress to impose withdrawal liability on employers and then permit them, under the Tucker Act, to sue the United States to recover any money they may be required to pay. The prospect of such recovery would remove the disincentive for withdrawals that the Act was designed to achieve.

Nor can an employer that continues to contribute to a pension plan collect under the Tucker Act for any asserted reduction in the value of its business as a result of the enactment of the Multiemployer Act. "Appellant's business may of course be less prosperous as a result of the regulation. That diminution in value, however, has never mounted to the dignity of a taking in the constitutional sense." *California State Automobile Association Inter-Insurance Bureau v. Maloney*, 341 U.S. 105, 111 (1951).

pension-plan payments were made pursuant to a collective-bargaining agreement. All private contracts are, of course, subject to governing law.[15] An agreement that restrains trade, for example, is not shielded from the effects of a new antitrust law that renders it illegal. *Northern Securities Co. v. United States*, 193 U.S. 197, 332 (1904). Similarly, an agreement between an employer and its employees prescribing wages is not immune from the effects of a new minimum-wage provision. *United States v. Darby*, 312 U.S. 100 (1941). In such cases courts have not viewed the pre-existing contract limitation as having been "taken" for "public use" within the meaning of the Fifth or Fourteenth Amendments. *See, e.g., Bowles v. Willingham*, 321 U.S. 503, 517 (1944); *Omnia Commercial Co. v. United States*, 261 U.S. 502, 508-10 (1923); *Block v. Hirsh*, 256 U.S. 135, 155-56 (1921).

Nor is Congress' public purpose in generally protecting the stability of pension funds a ground for characterizing its legislation as a "taking" of private property for "public use."[16] Legislatures always act in the per-

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[15] The Court said in *Norman v. Baltimore & Ohio R.R.*, 294 U.S. 240, 307-08 (1935):

> [C]ontracts, however express, cannot fetter the constitutional authority of the Congress. Contracts may create rights of property, but, when contracts deal with a subject-matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.

[16] The Act's obvious public purpose is sufficient, however, to defeat the Trustees' suggestion (Br. at 30-33) that the Act takes property for "private use" and is thus unconstitutional regardless of whether just compensation is paid. As this Court stated in *Berman v. Parker*, 348 U.S. 26, 33 (1954) (emphasis supplied): "Once the *object* is within the authority of Congress, the means by which it will be attained is also for Congress to determine." *Accord, e.g., Ruckelshaus v. Monsanto Co.*, 104 S. Ct. 2862, 2879 (1984); *Hawaii Housing Authority v. Midkiff*, 104 S. Ct. 2321, 2329 (1984).

ceived public interest. If consumers are benefitted at the expense of manufacturers, or employees at the expense of employers, individual private parties gain what others must give up. While the "public" may gain from such statutorily mandated transfers, they are surely not a "taking" of private property for "public use." If the appellants' reasoning were accepted, *all* legislation that had an adverse financial impact on private parties would be subject to the limitations of the Taking Clause.

In short, the creation of a statutory right in one party to recover a money judgment against another is not a governmental "taking" within the meaning of the Fifth Amendment. Cases in this Court that have considered how far governmental regulation of private property may go without being deemed a "taking" for constitutional purposes are plainly distinguishable from the present case. The law that appellants are challenging does not limit or regulate any specific property or property interest.[17] Instead, the law defines how two private parties are to allocate the financial consequences of the severance of their relationship. Prior to the enactment of the Multiemployer Act, a withdrawing employer could shift to the plan's remaining employers the financial obligation to fund all of the plan's vested benefits. After the Act took effect, the withdrawing employer became obliged to pay its fair share of any potential underfunding. Such a proper and equitable allocation of the responsibility for funding pension benefits is not subject to challenge under the Taking Clause.

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[17] The Court has suggested that rights in "specific property" may be entitled to protection under the Taking Clause even when the contract right under which they are alleged to have vested is not. *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 589-90 (1935). *But cf. Helvering v. Griffiths*, 318 U.S. 371, 400-01 & n.52 (1943). *See also United States v. Security Industrial Bank*, 459 U.S. 70, 77 (1982).

II. THE MULTIEMPLOYER ACT'S WITHDRAWAL LIABILITY PROVISION SATISFIES THE THREE-FACTOR TEST ESTABLISHED BY THIS COURT'S RECENT TAKING CLAUSE DECISIONS.

Even under the three-part constitutional test applied by this Court in its recent Taking Clause cases, the Multiemployer Act is constitutional. In *Penn Central Transportation Co. v. City of New York*, 438 U.S. at 124, this Court explained the factors that have been viewed as significant in Taking Clause determinations (citations omitted):

> The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. . . . So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

This "three-factor" test was repeated in subsequent rulings of this Court. *See, e.g., Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 295 (1981). In *Ruckelshaus v. Monsanto Co.*, 104 S. Ct. 2862, 2875 (1984), this Court observed unanimously that its prior decisions had "identified several factors that should be taken into account when determining whether a government action has gone beyond 'regulation' and effects a 'taking'":

> Among those factors are: "the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations."

A. The Withdrawal Liability Provision Is Not a "Physical Invasion by Government."

In appraising the "character" of the government's action, this Court has distinguished between a law or regulation that is part of a "public program adjusting the benefits and burdens of economic life to promote the common good" and a governmental interference with property that "can be characterized as a physical invasion." *Penn Central Transportation Co. v. City of New York*, 438 U.S. at 124. The employer liability provision of the Multiemployer Act is plainly the former. No identifiable property belonging to an employer is invaded by the government as a consequence of the Act. The monetary liability imposed by the law leaves the employer free to select any assets it wishes to satisfy the statutory obligation. Indeed, an employer may avoid the statutory obligation altogether by not withdrawing from the pension plan.[18]

Moreover, this Court specifically noted in its *Penn Central* opinion that governmental action that merely "adjust[s] the benefits and burdens of economic life to promote the common good" is the kind of regulation that would not ordinarily be subject to the Taking Clause. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980). And in *Gray*, 104 S. Ct. at 2717-18, this Court analogized the Multiemployer Act to the Black Lung Benefits Act of 1972, acknowledging that both were statutes "adjusting the burdens and benefits of

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[18] Justice Holmes' observation in *Noble State Bank v. Haskell*, 219 U.S. 575, 580 (1911), seems pertinent to the question of whether there is any taking here:

> [T]here is no out-and-out unconditional taking at all. The payment can be avoided by going out of the banking business, and is required only as a condition for keeping on.

By contrast, the employer here can usually avoid withdrawal liability by taking a far less drastic step—simply renouncing its inchoate business decision to withdraw from the plan.

economic life." Thus the "character" of the Multiemployer Act removes it from the category of those ordinarily subject to the Taking Clause.

B. The "Economic Impact" of Withdrawal Liability Is Uncertain.

The second of the Court's enumerated considerations is "the economic impact of the regulation." Generally, this factor involves the degree to which the private party subject to government regulation is deprived of the use of the property being taken. Thus, in *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83-84 (1980), the Court held that permitting free expression on a privately owned shopping center does not so significantly deprive the owners of the use or economic value of their property as to constitute a "taking."

An employer is, to be sure, completely deprived of whatever amount of money it is ultimately obliged to pay pursuant to the statutory liability. But the "economic impact" of the regulation is conditioned on a determination that there *is* liability,[19] and it is ameliorated by various moderating provisions of the Act. As discussed *infra* at pp. 32-36, Congress carefully included

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[19] Appellant Woodward, for example, may not have any withdrawal liability at all. See PBGC's Motion to Affirm, p. 6, n.6. Until the arbitrator determines, under 29 U.S.C. § 1401, whether there is liability, it is premature to consider any claim that property has been "taken," and any constitutional decision based on alleged "economic impact" would occur "in the rarefied atmosphere of a debating society." *Valley Forge College v. Americans United*, 454 U.S. 464, 472 (1982). *See Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 297; *see also Ruckelshaus v. Monsanto Co.*, 104 S. Ct. 2862, 2878 (1984); *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 105 S. Ct. 3108, 3121-22 (1985). Appellants' challenge to the Multiemployer Act on its face must, therefore, be denied, even if, in particular circumstances, an employer might be able to establish that in its case the Act had a significant "economic impact."

a number of moderating provisions that are specifically designed to reduce the "economic impact" of the Multiemployer Act on withdrawing employers. Rather than amounting to a "taking" of property, the economic impact of the Multiemployer Act on withdrawing employers is a " 'consequential incidence' of a valid regulatory measure." *Armstrong v. United States*, 364 U.S. 40, 48 (1960).

C. The Withdrawal Liability Provision Does Not Interfere with "Reasonable Investment-Backed Expectations."

This appeal concerns only *prospective* withdrawal liability. The constitutional issue is whether an employer that withdraws from a pension plan *after* the enactment date of the Multiemployer Act may claim that its property has been "taken" when statutory liability is assessed against it. This Court's decided cases make it plain that in these circumstances there has been no interference with any "reasonable expectation" that resulted in an investment in the appellants' "property." [20]

The employer that withdraws after the enactment date of the Multiemployer Act knows that a consequence of its withdrawal is assessment of statutory liability. The published law provides sufficient notice of what will happen in the future that any "expectation" to the contrary is patently unreasonable. This proposition is established in *Ruckelshaus v. Monsanto Co.*, 104 S. Ct. 2862, 2875-2876 (1984), where this Court held that submission of an application for pesticide registration after the effective date of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") gave implied consent to the

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[20] It is particularly difficult for appellant Trustees to identify any reasonable investment-backed expectations that have been displaced by the imposition of withdrawal liability. On the contrary, the Act is designed to protect the assets and financial stability of the Trust.

disclosure of trade-secret data pursuant to the Act. Although the Court recognized that the secrecy of the data was a constitutionally protected property interest,[21] it refused to treat it as a compensable "taking" of "private property" under the Fifth Amendment. The disclosure, as incident to potential federal registration, was treated as one of the burdens of living "in a civilized community." 104 S. Ct. at 2875.

It does not avail appellants to argue in this case that investments may reasonably have been made before the adoption of the Multiemployer Act. Monsanto made investments in the research and development of its pesticides before FIFRA was enacted. Nonetheless, the crucial date as of which this Court evaluated the property owner's "expectations" was the date on which the data was submitted to the government agency.[22] By the same token, the reasonableness of any "investment-backed expectations" must be judged as of the date of an employer's withdrawal.

Appellants' argument that employer withdrawals may be involuntary, or may be attributable to circumstances beyond an employer's control, is equally misplaced. See Woodward Br., p. 19; Trustees Br., p. 16, n.6. There are no such facts before the Court in this case. And in

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[21] No such constitutionally protected property interest is present in the case at bar. See *Peick v. Pension Benefit Guaranty Corp.*, 724 F.2d 1247, 1274-76 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 3554 (1984), and n. 17, *supra*.

[22] The Court treated data submitted between 1972 and 1978 differently because the government had promised confidentiality for trade-secret information filed with it in those years. 104 S. Ct. at 2877-78. Retroactive disclosure of data is analogous to imposition of withdrawal liability for a withdrawal that took place before adoption of the Multiemployer Act. In *Gray*, 104 S. Ct. 2709 (1984), this Court upheld the constitutionality of limited retroactivity, applicable as of a date during the legislative consideration of the Act.

any event, the particular reasons for any specific employer's withdrawal are not grounds for finding the entire withdrawal liability program invalid on its face, as appellants request. Moreover, Congress could reasonably have concluded that the difficulties of distinguishing between voluntary and assertedly involuntary withdrawals warranted across-the-board treatment of all employers that severed their relationship with a pension plan.[23] But for withdrawal liability, employers that remain in the plan would have to fund the pensions of the withdrawing employer's employees, regardless of whether the withdrawal was "voluntary."

Finally, we note that any alleged "expectation" must be moderated by the fact that ever since ERISA was adopted in 1974, multiemployer pension plans had been the subject of intense study and probable further legislation. Appellant Woodward knew for at least six years before 1980 that it might well be held responsible for an allocable portion of the pension plan's benefit commitments. As this Court noted in *Gray*, 104 S. Ct. at 2719, "[n]ot only did ERISA itself impose contingent liability on withdrawing employers, but the various legislative proposals debated by Congress before enactment" of the Multiemployer Act gave employers "ample notice" of the withdrawal liability that was to come. This Court has stated in a slightly different, but analogous, context: "Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end. . . . Invocation of the Due Process Clause to protect the rights

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[23] It is by no means clear which withdrawals are entirely beyond an employer's control. For example, in the context of employee decertification of a bargaining representative, employer complicity, coercion, or intimidation is not unknown. *See, e.g., L'Eggs Products, Inc. v. NLRB*, 619 F.2d 1337, 1346 (9th Cir. 1980); *NLRB v. Triumph Curing Center*, 571 F.2d 462, 475-76 (9th Cir. 1978); *NLRB v. Deutsch Co.*, 445 F.2d 902, 906 (9th Cir. 1971); *cf. NLRB v. Gissell Packing Co.*, 395 U.S. 575, 580 n.1 (1969).

asserted here would make the ghost of *Lochner v. New York*, 198 U.S. 45, walk again." *Federal Housing Administration v. Darlington, Inc.*, 358 U.S. 84, 91 (1958) (citations omitted). Similarly, the Taking Clause should not be invoked to revive "the ghost of *Lochner*."

III. WITHDRAWAL LIABILITY IS NOT A "TAKING" OF PRIVATE PROPERTY UNDER ANY OTHER STANDARD APPLIED IN THIS COURT'S TAKING CLAUSE DECISIONS.

The Court has acknowledged that there is no " 'set formula' for determining when 'injustice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Penn Central Transportation Co. v. City of New York*, 438 U.S. at 124. Consequently, the Court has said that the constitutional decision under the Taking Clause turns on "ad hoc, factual inquiries" into the unique circumstances of each situation. *Id.; see also Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979).

The governing rationale behind the Taking Clause was articulated in *Armstrong v. United States*, 364 U.S. at 49, and its application to this case demonstrates why the Fifth Amendment's protection is inapplicable here:

> The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

Congress could reasonably have concluded that it is not fair to place the burden of funding potential shortfalls in a multiemployer pension plan on the public as a whole." It is fair to place the burden on the employers that have benefitted from the years of labor in which their employees have engaged. And it is particularly fair to say

to an employer that severs its relationship with a pension plan whose vested benefits are insufficiently funded that it must pay a fair allocable share of that threatened shortfall.

This is not, in other words, a situation in which a benefit to the general public is being exacted at the expense of individuals who "happen to lie in the path of the project." *United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945). Nor is it a case in which injuries caused by public action "remain disproportionately concentrated on a few persons." *Penn Central Transportation Co. v. City of New York*, 438 U.S. at 124. Withdrawing employers are an entirely suitable group to be required to share with remaining employers the financial responsibility for potential shortfalls that could disappoint employee expectations.

Nor is this a case in which governmental regulation "goes too far" and is, on that account, "recognized as a taking." *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). If the withdrawal liability provision is to be deemed a form of "regulation," it is precisely suited to its purpose—to insure stability in employee pension plans.[24] In light of ample proof before Congress that employer withdrawals jeopardized the solvency of pension plans, Congress properly made withdrawing employers liable for a share of the plan's potential underfunding. The right being claimed in this case by withdrawing employers—to avoid immediate liability for potential underfunding—was correctly described by the district court in *Peick v. Pension Benefit Guaranty Corp.*, 539 F. Supp. 1025, 1044 (N.D. Ill. 1982), *aff'd*, 724 F.2d 1247 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 3554

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[24] A recent survey by the General Accounting Office confirms that withdrawal liability "increases the pension security of participants in poorly funded plans." Report to the Congress by the Comptroller General of the United States, *Effects of Liabilities Assessed Employers Withdrawing from Multiemployer Pension Plans*, GAO/HRD-85-16 (*"Liabilities Report"*) 17 (Mar. 14, 1985) (App. 9a).

(1984), as "the right to unleash forces that are disruptive of benefit security."

IV. WITHDRAWAL LIABILITY SATISFIES THE FIFTH AMENDMENT'S DUE PROCESS STANDARD.

We turn, finally, to the more traditional question in cases involving socioeconomic legislation that adjusts "the benefits and burdens of economic life"—Does the statute meet the standards of the Due Process Clause? It is plain, we submit, that Congress was confronted with a serious economic problem and chose a reasonable solution when it adopted the Multiemployer Act in 1980.

A. The Threat of Pension Plan Insolvency Was a Critical National Problem.

Congress found that frustration of multiemployer pension benefit expectations was a national problem subjecting disappointed participants to the "terrible cycle of poverty and desperation which may be their fate if they are shortchanged on pension benefits." 126 Cong. Rec. H7908 (daily ed. Aug. 26, 1980) (Rep. Pepper). Congress also found that employer withdrawals from multiemployer plans threatened not only the plans themselves, but also the future of labor-management relations. 29 U.S.C. § 1001a. Indeed, uncertainty over pension benefit payments was believed to have been a substantial factor in the nationwide coal strike of 1978, whose impact could have affected the nation's ability to "end [its] dangerous reliance upon foreign fuel sources." 126 Cong. Rec. S10105 (daily ed. July 29, 1980) (Sen. Randolph). Congress therefore decided that multiemployer pension benefit security was a problem which could not be left to solution in the private sector.

B. Congress Carefully Weighed Alternative Solutions.

Congress' initial approach, enacted in ERISA in 1974, was an insurance program providing guarantees to be

paid by the Pension Benefit Guaranty Corporation upon termination of covered plans. But Congress soon learned that termination insurance for multiemployer plans amounted to treating the patient only after he had become incapacitated. Careful study of multiemployer plans between 1974 and 1980 revealed that the most serious threat to a multiemployer plan was repeated employer withdrawals from the plan. Thus, even if the plan did not terminate, multiple withdrawals could weaken it and render it unstable. Withdrawals unfairly shifted to remaining employers the responsibility for funding the pension entitlements earned by the employees of the withdrawn employer, precipitating new withdrawals and further threatening plan viability. The legislative solution enacted in 1980 was to impose on certain withdrawing employers a liability that would counteract the incentives to withdraw from their plans, and would financially cushion such plans against the loss of the withdrawing employers' contributions when withdrawals did occur.

Amici argue that withdrawal liability is unnecessary because "the vast majority of multiemployer plans are financially sound." Brief of Amicus NAM, p. 9. They argue that an individual employer's continuing participation in a multiemployer plan is not needed to satisfy the expectations of participants. This argument ignores the most basic congressional conclusion—that without the enactment of the Multiemployer Act and especially without its withdrawal liability provisions, many multiemployer plans will fail in the future.

To be sure, a single employer's withdrawal may have little observable impact on a plan's financial health. But Congress acted to forestall the cumulative harm resulting from numerous withdrawals. This Court found that the concern that such harm might occur even during the limited pre-enactment period was "eminently rational." *Gray*, 104 S. Ct. at 2719.

Nor was Congress constitutionally required to attempt to impose withdrawal liability only for plans that meet a "needs" test. As the Ninth Circuit described Congress' decision:

> [D]etermination of whether a plan is financially sound is a difficult calculation at best, and Congress had no obligation to deny relief to the funds until they unambiguously approached insolvency.

Board of Trustees of Western Conference of Teamsters Pension Trust Fund v. Thompson Building Materials, Inc., 749 F.2d 1396, 1403 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 2116 (1985). Congress also recognized that regardless of the test used to measure financial difficulty, any attempt to impose withdrawal liability only where a plan is determined to be in financial difficulty would create the same problem Congress had identified with respect to the termination-insurance provisions of ERISA—it would encourage employers to withdraw from plans prior to the point at which liability would be assessed.

Congress carefully considered the available alternatives to imposition of withdrawal liability. *See House Labor Report* 222, U.S. Code Cong. & Ad. News 2987 (separate views). In view of the "economic havoc" that it found would accompany renunciation of benefit guarantees, Congress acted rationally in attempting to ensure, in part through withdrawal liability, that participants' expectations were fulfilled.

Nor was Congress constitutionally obliged to distinguish between voluntary and involuntary withdrawals. Congress believed that employers had sufficient control over the act of withdrawal that the prospect of withdrawal liability would, in many cases, induce them to continue contributing to their plans. And, as we have previously noted (pp. 25-26 & n.23, *supra*), the line between voluntary and involuntary withdrawals is often indistinct.

Even in the case of a truly "involuntary" withdrawal, the employer has benefitted from its association with a

multiemployer pension plan which now lacks sufficient assets to meet its vested liabilities. Withdrawal liability is designed to ensure that the employer carry its share of the burden of closing such deficits. Any rule according special treatment to purportedly involuntary withdrawals would also encourage employers to withdraw in the hope that their withdrawals would be viewed as "involuntary." Such a result would undermine the deterrent effect of withdrawal liability which Congress sought to achieve, and would unfairly shift funding responsibilities to the remaining employers.[25]

C. Congress Inserted Ameliorating Provisions.

The Multiemployer Act was not adopted until it had been reviewed and modified by four legislative committees, whose deliberations benefitted from extensive private sector participation. Congress responded to the suggestions of private parties by enacting numerous provisions to moderate the impact of withdrawal liability and to reduce its burdens to the minimum amount necessary to effect the statutory purpose. Sections 4203, 4204, 4207, 4208, 4209, 4210, 4217, 4218, 4219, 4224, and 4225 of ERISA, 29 U.S.C. §§ 1383, 1384, 1387, 1388, 1389, 1390, 1397, 1398, 1399, 1404, and 1405, are all part of Con-

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[25] Congress was hardly insensitive to the issue of "involuntary" employer withdrawal. Section 412(a)(1)(B) of the Multiemployer Act, 29 U.S.C. § 1306 note, calls for a study of "union-mandated withdrawals" to determine whether special rules governing such occasions are appropriate. Pending the adoption of any such rules, however, the Multiemployer Act treats involuntary and voluntary withdrawals alike because, as one district court has stated:

> From the perspective of the remaining employers in the plan and of the employees who expect to receive benefits from the plan, the voluntariness of one employer's withdrawal is irrelevant. What they are concerned with is there being sufficient funds to meet the obligations of the plan.

Pacific Iron & Metal Co. v. Western Conference of Teamsters Pension Trust Fund, 553 F. Supp. 523, 526 (W.D. Wash. 1982).

gress' effort to limit the application and impact of withdrawal liability. Indeed, much of the complexity of the Multiemployer Act is attributable to Congress' concern that appropriate moderating provisions should be included.

(1) *Transactions Not Classified as Withdrawals*—Congress exempted from the employer liability requirement a number of transactions that are not to be characterized as "withdrawals":

> (a) Special definitions apply in determining whether there has been a complete or partial withdrawal from a pension plan in the building and construction industry or in the entertainment industry. 29 U.S.C. §§ 1383(b), 1383(c), 1388(d)(1), 1388(d)(2). A somewhat different set of rules applies in connection with plans which receive substantially all of their contributions from employers primarily engaged in the trucking industry. *Id.* § 1383(d).
>
> (b) If certain conditions designed to protect the plan are met, a cessation or reduction of covered operations or contribution obligations as a result of a sale of an employer's assets will not result in a withdrawal. *Id.* § 1384.
>
> (c) A withdrawal does not occur solely because an employer has ceased to exist because of a change in corporate structure or a change to an unincorporated form of business enterprise, so long as the successor continues to contribute to the plan. *Id.* § 1398(1).
>
> (d) A withdrawal does not occur solely because an employer suspends contributions under the plan during a labor dispute involving its employees. *Id.* § 1398(2).

Each of these provisions evidences a congressional attempt "to impose liability only to the extent necessary to achieve the legislative purpose." *Peick v. Pension Benefit Guaranty Corp.*, 724 F.2d 1247, 1268 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 3554 (1984). Moreover, as au-

thorized by the Act, the PBGC has promulgated a final rule regarding the procedures to be followed by plans in other industries that wish to narrow the definition of "withdrawal." 29 C.F.R. Part 2645 (1982).

(2) *Reductions in Withdrawal Liability*—Congress mitigated the size of the financial liability in various instances:

> (a) The amount of unfunded vested benefits allocable to an employer is reduced in accordance with the *de minimis* rule of 29 U.S.C. § 1389(a). One effect of this provision is to eliminate withdrawal liability entirely for an employer whose obligation would be equal to or less than the smaller of (1) ¾ of 1 percent of the plan's unfunded vested obligations, or (2) $50,000. Plans may, by amendment, increase this latter limit to as much as $100,000. *Id.* § 1389(b). The principal purpose of this "significant moderating feature," *Peick*, 539 F. Supp. at 1050, is to reduce the burden of withdrawal liability on small employers. *See* 126 Cong. Rec. S10100 (daily ed., July 29, 1980) (Sen. Javits). According to a recently published congressional study, a great majority of withdrawing employers benefit from the existence of this provision. *Liabilities Report, supra* note 24, at 42 (App. 9a-10a).
>
> (b) If an employer liquidates its business, its withdrawal liability will ordinarily be limited to a percentage of the employer's liquidation value. 29 U.S.C. § 1405(a)(1). Alternatively, the liability may be the amount of the plan's unfunded vested benefits attributable to employees of the employer. *Id.* § 1405(a)(2). However, this latter alternative entails a determination which may be extremely difficult if not impossible, few plans appear to have attempted it, and consequently the employer's liability is ordinarily limited to the percentage of liquidation value determined under the schedule of mar-

ginal rates. PBGC Opinion Letter 82-8, March 25, 1982 (App. 12a).[26]

(c) Withdrawal liability is not due in a lump sum, but is instead payable over time—usually the period necessary to amortize the employer's withdrawal liability at a payment level based on the employer's pre-withdrawal contribution history. 29 U.S.C. § 1399(c)(1). If that period exceeds 20 years, the employer's liability is limited to the first 20 annual payments. *Id.* § 1399(c)(1)(B).

(d) Subject to certain conditions, a plan may be amended to provide that a new employer may with-

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[26] In view of this provision, amicus ATA completely misses the mark with its argument that withdrawal liability takes property by forcing employers to remain in business against their will. Section 1405(a) permits an employer to liquidate its business and retain a substantial percentage of the proceeds. No employer that forgoes this option and continues to operate a losing business should be heard to argue that it is being forced to remain in business against its will. The Multiemployer Act does not require that it do so, and thus the *Brooks-Scanlon* line of cases relied on by the ATA are totally inapposite.

Appellants and amici also attack the Multiemployer Act because it does not contain a net worth limitation on withdrawal liability identical to the 30 percent limitation on termination liability originally available under ERISA. However, Congress found this limitation to be a serious flaw in ERISA, since it provided an incentive to terminate in order to shift liabilities onto the PBGC. *See* PBGC Study 51, *House Labor Hearings* 1205; 126 Cong. Rec. S11668 (daily ed. Aug. 26, 1980) (Sen. Javits). Indeed, the PBGC has found the 30 percent limit to be a major source of abuse in the single-employer program and has recommended that the limit be eliminated. The reason is that an employer's "net worth" may not "prove to be an adequate gauge of its ability to meet pension obligations," *Single-Employer Report, supra* note 4, at 44 (Nov. 14, 1983) (App. 4a). For instance, Woodward states that Roy L. Klema Engineers, Inc., was assessed withdrawal liability in an amount "seven times its net worth." However, Klema's withdrawal liability payments would have been a small fraction of the amounts of discretionary distributions Klema has made to its shareholders. Declaration of Robert M. Klein in Opposition to Motion for Summary Judgment (Docket Item No. 177) at 7-10.

draw without liability if the employer had an obligation to contribute for no more than six consecutive plan years or, if shorter, the number of years required for vesting under the plan. *Id.* § 1390. This "free look" provision is intended to encourage new employers to join multiemployer plans without the immediate risk of incurring withdrawal liability.

(e) Plans may adopt rules for other terms under which employer withdrawal liability may be discharged. *Id.* § 1404.

(3) *Post-Withdrawal Conduct*—The Multiemployer Act established abatement rules which reduce or eliminate an employer's withdrawal liability if certain events occur *after* the employer's withdrawal. These rules are extremely complex, particularly as they apply to partial withdrawal liability. In general, however, withdrawal liability may be abated if an employer (1) resumes covered operations after a complete withdrawal or (2) increases its contribution base units after a partial withdrawal. 29 U.S.C. §§ 1387, 1388.

The complex interaction of withdrawal liability and its moderating provisions reflect a congressional responsiveness to the extensive private-sector effort which contributed to the passage of the Multiemployer Act. The Multiemployer Act was a carefully crafted congressional response to a broad spectrum of labor, industry, and governmental concerns. As the Seventh Circuit has observed: "The various moderating features of the [Multiemployer Act], such as exclusions from the definition of withdrawal, the partial exemption of certain industries and the *de minimis* exemptions, indicate that Congress attempted to impose the burdens of the legislation only to the extent necessary to achieve its legislative objective." *Peick v. Pension Benefit Guaranty Corp.*, 724 F.2d at 1268.

D. Congress Rationally Balanced the Relevant Considerations.

Congress reasonably concluded that employer withdrawals from multiemployer plans imposed burdens on (1) the remaining employers through increased funding obligations and increased potential liability in the event of plan termination, (2) premium payers through the increased likelihood of plan terminations resulting in losses to the insurance system, and (3) participants through the prospect of diminished benefits if plans were forced to terminate. Under these circumstances, the imposition of liability on withdrawing employers as well was justified as a rational measure to spread the costs of employees' pensions "to those who have profited from the fruits of their labor." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 18 (1976). The court below, and all the courts that have considered the issue, have concluded that where vested pension benefit expectations are threatened, Congress acts reasonably if it requires those expectations to be fulfilled and directs employers who have benefitted from reliance on those expectations to fund them, even if that necessitates modification of bargained-for employer expectations. "We see no disabling inequity in imposing withdrawal liability on employers when the pension plans they have joined voluntarily turn out to be underfunded." *Peick v. Pension Benefit Guaranty Corp.*, 724 F.2d at 1273.

Appellants and amici argue that it is inequitable to impose liability on withdrawing employers. Amicus ATA attributes to Congress "a large measure of responsibility for the problem to which the [Multiemployer Act] was directed—financially troubled and unstable multiemployer plans." ATA Brief, p. 9. According to the ATA, Congress "restricted the ability of multiemployer plans to respond to financial difficulties" by removing their ability to "defer funding, restrict vesting or reduce benefits." *Id.* & n.17.

Congress, of course, had determined that precisely those practices were the cause of the frustration of benefit expectations that ERISA was adopted to counteract. 29 U.S.C. § 1001(a), (c). The ATA is therefore either expressing a difference of opinion with Congress' policy decision that pension security is a proper matter for national legislative treatment, or questioning Congress' fact-finding. But such factual and policy determinations are both for Congress, and not for this Court.

Appellant Woodward and the amici also allege that underfunding results from the trustees' excessive benefit promises, and that employers are divorced from any responsibility by the fund's "sole control" over the management of the plan and its authority to set benefit levels. In the first place, most multiemployer plans, including the Trust whose Trustees are appellants here, permit amendment by collective bargaining. See Trust, Article XI, Section 1 (1960) (Docket Item No. 9, Exhibit A) (App. 15a). See also *id.*, Article IX, Section 1. Thus, employers could have negotiated limits on trustees' benefit commitments.[27] They have had six years' notice—between the enactment of ERISA and the enactment of the Multiemployer Act—that they might become obligated to fulfill those commitments. Having chosen to enjoy the

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[27] We note also that in many trucking industry plans the connection between the benefits received by participants and the level of contributions negotiated by their employers is quite clear to the employers, the union, and the participants. For example, until recently, the Central States, Southeast and Southwest Areas Pension Fund had a schedule of "benefit classes" which expressly related benefit levels to contribution levels. The term "benefit classes" has been changed to "contribution classes," but the change in terminology did not change the underlying reality—the schedule still explicitly relates benefits to contribution levels. Thus, although the trustees initially establish the benefits within a given benefit class or contribution class, and have authority to modify those benefits, participants' reliance on a particular level of benefits is based in large measure on the contribution rate negotiated by their employer.

rewards of the trustees' pension promises, employers may not now insist that they have no responsibility for ensuring that the promises are kept.

Moreover, it is by no means clear that employers' interests are ignored by plan trustees. As one court has stated: "Actual consideration of [employer] interests is . . . likely, given management's statutory right to select half of the trustees." *Peick*, 539 F. Supp. at 1048.[28] Furthermore, a recent government study and policy statements by employer associations reveal that employers can and do affect benefit decisions, as Congress anticipated they would.[29]

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[28] The court in *Keith Fulton* stated its view that, contrary to the argument advanced here, "[e]mployer-appointed trustees do not violate their fiduciary duties simply because they are sensitive to the management perspective of what is best for the plan." 762 F.2d at 1142 n.5 (quoting *NLRB v. Amax Coal Co.*, 453 U.S. 322, 343 (1981) (Stevens, J. dissenting)). The *Keith Fulton* court went on to state that "[t]he majority holding in *Amax* is not to the contrary." *Id.* Indeed, the funds involved in *Amax* also demonstrate the ability of bargaining parties to limit trustee discretion. See Brief of the Trustees of United Mine Workers of America 1950 and 1974 Pension Plans as Amici Curiae In Support of Appellee at 3, 7-8. In those plans, benefits and eligibility requirements are specified in the collective bargaining agreement, and the trustees "are obligated to enforce these determinations unless modification is required to comply with applicable federal law." *United Mine Workers of America Health & Retirement Funds v. Robinson*, 455 U.S. 562, 573-74 (1982).

[29] See Report to the Congress by the Comptroller General of the United States, *Effects of the 1980 Multiemployer Pension Plan Amendments Act on Plan Participants' Benefits*, GAO-HRD-85-58 at 16 (June 14, 1985) (App. 17a): "[o]fficials at . . . 10 [of 51 surveyed] plans said that employers were generally more reluctant to negotiate benefit improvements because higher plan costs could result in higher employer withdrawal liability." See also *id.* at 17 (App. 18a). Additionally, the Associated General Contractors of America, one of the employer associations that negotiated the collective bargaining agreement adopted by Woodward, urges that "[c]ontractors involved with plans which are less well-funded should work to improve funding either at the bargaining table or through the plan trustees." Inventory of Construction Industry Multiem-

Finally, Section 412 of the Internal Revenue Code, 26 U.S.C. § 412, imposed specific funding requirements that effectively limit trustee discretion to increase benefit levels. The Multiemployer Act strengthened those funding requirements, further limiting such discretion.

In any event, Congress refrained from placing the entire burden of plan underfunding on withdrawing employers. On the contrary, withdrawal liability was only one feature of a comprehensive revision of the law governing multiemployer plans. Funding rules were tightened so that employers contributing to ongoing plans have to make minimum payments higher than under the 1974 law. 26 U.S.C. § 412(b)(2)(B). Premiums were increased. 29 U.S.C. § 1306(a)(3)(A)(ii). PBGC funds were made available to supplement employer-derived assets so that insolvent plans can continue operating, though with reduced benefit payments. *Id.* §§ 1431, 1425, 1426. Participants' benefits were made subject to limited reductions in plans suffering substantial financial difficulties, *id.*, and the ultimate protection of benefit payments, the PBGC's guarantee, was reduced. *Id.* §§ 1322a, 1322b. In short, Congress "spread the pain around." *Peick v. Pension Benefit Guaranty Corp.*, 539 F. Supp. at 1052.

Evaluating another provision of this same Act, this Court said in *Gray*, 104 S. Ct. at 2717-18: "[L]egislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and . . . the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Accord,*

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ployer Pension Plans (February 1983), p. 6 (App. 21a). The AGC notes that "management trustees have become more active in plan administration and many plans have gone to great lengths to improve funding." *Id.*, p. 3. Indeed, Senator Dole had observed that the Multiemployer Act could result in increased direct bargaining over multiemployer plan benefits. 126 Cong. Rec. S10103 (daily ed. July 29, 1980).

PruneYard Shopping Center v. Robins, 447 U.S. at 85: "[T]he law shall not be unreasonable, arbitrary or capricious, and . . . the means selected shall have a real and substantial relation to the objective sought to be attained" (quoting *Nebbia v. New York*, 291 U.S. 502, 525 (1934)). As we have demonstrated, the Multiemployer Act rationally adjusts the benefits and burdens of economic life in a manner that is not arbitrary and is reasonably suited to carry out its statutory objective. Consequently, it satisfies the requirements of both the Due Process and Taking Clauses of the Fifth Amendment.[30]

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[30] The Trustees contend at the close of their brief that ERISA's requirement that the Pension Trust pay premiums to support the Act's termination and insolvency insurance programs must be struck down both because it is "inseverable" from the allegedly unconstitutional withdrawal liability provisions and also because the discretionary authority accorded the PBGC under the 1974 Act violated the constitutional separation-of-powers principle. Neither of these contentions has the slightest merit. With respect to "inseverability," ERISA has contained the following provision (29 U.S.C. § 1139) from the outset:

> If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of this Act or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

As this Court declared in *INS v. Chadha*, 462 U.S. 919, 932 (1983), this provision "gives rise to a presumption that Congress did not intend the validity of the Act as a whole, or any part of the Act, to depend upon whether [a particular provision] was invalid." As was the case in *Chadha*, nothing in the legislative history of ERISA or its amendments justifies abrogation of that presumption.

The Trustees' argument that the discretionary authority granted the PBGC between 1974 and 1980 violated the principle of separation of powers is also far-fetched. Congress delineated a "clear, intelligible principle," *J.W. Hampton & Co. v. United States*, 276 U.S. 394, 409 (1928), to guide the PBGC in the exercise of its discretionary authority under former 29 U.S.C. § 1381(c)(2) (1976) (now 29 U.S.C. § 1461(c)(2)). That section stated that the PBGC is to pay benefits if it determines "that the payment by [the PBGC] of benefits guaranteed under [Title IV of ERISA]

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with respect to that plan will not jeopardize the payments the [PBGC] anticipates it may be required to make in connection with [the mandatory guarantee program]." Congress legislated discretionary rather than mandatory coverage for multiemployer plans prior to 1980 because it needed "time for thorough consideration of the complex issues posed by the termination of multiemployer pension plans." *Gray*, 104 S. Ct. at 2714 n.1. In these circumstances, the delegation of discretionary authority was a reasonable means of achieving congressional aims and it "must be judged according to common sense and the inherent necessities of governmental coordination." *J.W. Hampton*, 276 U.S. at 406. Under former 29 U.S.C. § 1381(c)(1) (1976), the PBGC was required to "notify the Committee on Education and the Committee on Ways and Means of the House of Representatives, and the Committee on Finance of the Senate" whenever it exercised its discretionary authority. However, the constitutional scheme of separation of powers does not require a "hermetic sealing-off of the three branches of government from one another." *Industrial Union Dept. v. American Petroleum Institute*, 448 U.S. 607, 673 (1980) (Rehnquist, J., concurring in judgment). The requirement that Congress be notified is simply one of those "formal reporting requirements . . . well within Congress' constitutional power." *INS v. Chadha*, 462 U.S. at 955 n.19.

CONCLUSION

For the foregoing reasons, the judgment of the district court sustaining the Multiemployer Act against constitutional challenge should be affirmed.

Respectfully submitted,

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September 1985

APPENDIX

APPENDIX

BY THE COMPTROLLER GENERAL
REPORT TO THE CONGRESS
OF THE UNITED STATES

Legislative Changes Needed To Financially Strengthen Single Employer Pension Plan Insurance Program

The federal insurance program for single employer (sponsor) pension plans administered by the Pension Benefit Guaranty Corporation was created by the Employee Retirement Income Security Act of 1974. At the end of fiscal year 1982, the program reported a $333 million deficit because claims from terminating plans accumulated faster than they could be financed from premiums. The Corporation estimates that unless premiums are increased this deficit could increase to an estimated $938 million by fiscal year 1987.

Claims result primarily from bankrupt sponsors who are unable to continue funding pension plans. However, other circumstances also contribute to the increasing deficit: (1) full insurance coverage is generally provided for benefits granted retroactively for past service that have received limited sponsor funding; (2) minimum plan contributions by sponsors are deferred with Internal Revenue Service approval and remain unpaid upon plan termination; and (3) authority to recover unfunded pension liability for plans from sponsors is limited.

This report contains recommendations to the Congress to financially strengthen the program.

GAO/HRD-84-5
NOVEMBER 14, 1983

* * * *

[42] CHAPTER 5

PBGC AUTHORITY LIMITED IN RECOVERING UNFUNDED LIABILITY FROM TERMINATING PLAN SPONSORS

ERISA employer liability provisions limit PBGC recovery of unfunded pension obligations from sponsors terminating pension plans. During the first 7 years of operation, the insurance program incurred $397 million in claims for underfunded plans, of which it expected to recover an estimated $60 million of employer liability. Pension obligations not recovered from sponsors of terminating plans are funded from premiums paid to the program by ongoing plans.

When a plan terminates, the plan's sponsor is obligated by ERISA to finance any deficiency in plan assets needed to meet the insurance program's guarantee levels up to a limit equal to 30 percent of the sponsor's net worth—the difference between the value of business assets and liabilities accumulated at a point in time. Such liability provisions were expected to deter solvent sponsors from terminating underfunded plans and produce a reasonable, although limited, recovery of liability from insolvent sponsors. These objectives are not being met because most sponsors do not have a positive net worth or their net worth is low in relation to the level of unfunded guaranteed benefits in terminated plans.

Our review of 38 pension plan terminations by 25 sponsors (which included 8 ongoing and 17 in bankruptcy or business liquidation) showed that PBGC's recovery from the terminating plans' sponsors was limited because:

—Thirty percent of their net worth was not sufficient to pay the unfunded pension plan liability for seven sponsors that continued in business after terminating plans.

—Contingent liabilities were not established against six companies that divested portions of their businesses, including underfunded pension plans terminated later by insolvent sponsors.

—Six insolvent sponsors' assets were distributed to unsecured creditors, but PBGC recovered little or none of its claim, which was limited by the sponsor's net worth.

[43] LIMITATIONS ON RECOVERY OF EMPLOYER LIABILITY FROM ONGOING SPONSORS

The insurance program is absorbing large plan insufficiencies when ongoing plan sponsors voluntarily terminate insufficient plans. PBGC absorbs the pension liabilities of these plans without significant recovery of employer liability when the sponsor terminates a deficient plan at a time when business net worth is low and PBGC has little or no financial basis under ERISA to recover employer liability.

Almost one-third of terminated pension plans trusteed or expected to be trusteed by the insurance program as of September 30, 1981, were sponsored by employers who continued in business while avoiding about $17 million in liabilities for plan asset insufficiencies (see table 3, p. 11). While this sponsor group has the highest employer liability collection rate, it is questionable whether the program should act as a financial relief mechanism for solvent sponsors to avoid the consequence of pension plan underfunding.

The Congress and authorities in the pension community have raised concerns that other ongoing businesses in financial distress seeking relief from pension liabilities they have created could take advantage of ERISA provisions and terminate pension plans when company net worth is low. PBGC has identified 34 major firms with large unfunded pension liabilities that are under financial

pressure. Should these companies terminate their plans, PBGC estimates they could generate claims of about $4.4 billion against the insurance program.

Eight of the sponsors in our review terminated pension plans and were still in business in 1982. About $12.8 million of plan asset insufficiencies totaling $26.3 million was expected to be collected from seven sponsors (PBGC's evaluation of one sponsor's net worth was not completed at the time of our review). The following examples illustrate ways in which ERISA's 30-percent net worth limitation prevented PBGC from recovering additional unfunded liabilities.

—A sporting goods manufacturer experienced net losses of $2.8 million and $4 million in 1976 and 1977, respectively. Citing adverse financial conditions, the company terminated two pension plans in December 1977. The plans were insufficient by about $1.8 million. Because the company's net worth was $200,000 at the time it terminated the plans, PBGC expected to collect only $60,000 in employer liability. An August 1982 Dun & Bradstreet, Inc., report showed that, despite the depressed economy, the company's sales increased and an operating profit of [44] $145,000 after taxes was realized in 1980. Hence, this employer's net worth did not prove to be an adequate gauge of its ability to meet pension obligations.

—A mattress manufacturer adopted a pension plan for its hourly employees in 1950 and one for its salaried employees in 1960. The company, after suffering losses of about $3.9 million during fiscal years 1973-76 and reporting a net worth of $50,000 as of March 1976, terminated its salaried plan in 1976 and its hourly plan in 1978. The 1976 termination resulted in a claim of $596,941 on the insurance program and a collection of $15,000 in employer liability. The 1978 termination resulted

in a claim of $512,432, and PBGC expects that employer liability will be low. A September 1982 Dun & Bradstreet report showed the company continuing in business with estimated annual sales of about $8 million compared to about $4.4 million in 1978. Despite its financial distress, the company established a successor plan for its hourly employees which provided defined benefits covered by PBGC's insurance program, including past service benefits for the same employees extending back to the years covered by the terminated insufficient plan.

When an ongoing sponsor terminates its plan(s), there are other negative implications for the insurance program and for plan participants. Plan participants must accept guaranteed benefit levels that are often reduced by ERISA benefit ceilings in lieu of the plan's higher benefit levels. The added requirements for benefit payment administration associated with participants in the plans that ongoing sponsors terminate increase insurance program costs paid by all plans.

* * * *

284 BNA PENSION REPORTER A-22 (March 31, 1980)

* * * *

The only other rollcall vote during the markup was over an amendment proposed by Rep. Richard T. Schulze (R-Pa.) which would have put a 3 percent per year reduction on the guarantee for subsidized early retirement benefits.

The amendment was opposed by the coalition of labor and employer groups that support the legislation. [PBGC Executive Director Robert E.] Nagle indicated that the coalition includes the National Coordinating Committee for Multiemployer Plans, National Construction Employers Conference, Food Marketing Institute, United Food and Commercial Workers, Western Conference of Teamsters, ERISA Industry Committee, National Association of Manufacturers, and others.

Nagle opposed the amendment on the ground that it would create a disparity in guarantees between the single employer and multiemployer programs. The amendment was defeated by a vote of 21-12.

from—

Bennett C. Whitlock, Jr., President
American Trucking Associations
1616 P Street, N.W., Washington, D.C. 20036

No. 32
June 16, 1980

TRUCK LINE

ERISA AMENDMENT BILL CLEARS SENATE FINANCE COMMITTEE

The Senate Finance Committee last week completed markup of the ERISA Multi-Employer Plans Amendments Act, S. 1076. The changes we had sought in the bill were adopted, with some modifications.

The bill provides that an employer who totally or partially withdraws from a union multi-employer pension plan is liable for a share of the plan's unfunded vested obligations. But it contains an exemption, which we had sought, that would allow employers to withdraw without liability from plans in which the contribution base remains stable. In order to get this amendment, we agreed that the withdrawing employer would post a bond that could be cancelled after five years if the plan's contribution base did not substantially decline. Under this provision, which was supported by Sen. David Durenberger (R-Minn), the Pension Benefit Guaranty Corporation, which insures the pension funds, will be the judge of whether the contribution base has been damaged by a withdrawal. . . .

BY THE COMPTROLLER GENERAL
REPORT TO THE CONGRESS
OF THE UNITED STATES

3/14/85

Effects Of Liabilities Assessed Employers Withdrawing From Multiemployer Pension Plans

The most controversial changes the Multiemployer Pension Plan Amendments Act of 1980 made to the Employee Retirement Income Security Act of 1974 concerned the liability imposed on employers withdrawing from multiemployer defined benefit pension plans. Under the amendments a withdrawing employer must generally continue payments to the plan for its share of the plan's unfunded vested benefits, which are the value of nonforfeitable benefits under the plan less the value of the plan's assets.

GAO believes that the liability imposed on withdrawing employers increases the pension security of participants in poorly funded plans. It also provides an additional measure of protection for the Pension Benefit Guaranty Corporation's insurance fund established by the 1974 act to guarantee plan benefits. However, changes can be incorporated to make application of withdrawal liability more effective and equitable. Toward that end, this report proposes two amendments to the withdrawal liability provisions for the Congress to consider.

GAO/HRD-85-16
MARCH 14, 1985

[17]

CONCLUSIONS

Many multi-employer plans are well funded. However, many of the 8.3 million participants in multiemployer defined benefit pension plans are in plans which are not well funded. The 24 plans in our sample, which were less than 50 percent funded for vested benefits, have over 950,000 participants. Labor, in its November 19, 1984, study of multiemployer pension plans, found that 15 percent of all multiemployer plans were less than 50 percent funded and that such plans tended to be much larger in size than average, covering 29 percent of all participants.

MPPAA provides increased financial protection for multiemployer plans to the extent that the withdrawal liability provisions (1) discourage employers from withdrawing from plans and (2) result in the collection of a part or all of a withdrawing employer's allocated share of a plan's unfunded actuarial liability. This in turn increases the pension security of participants in poorly funded plans. It also provides a measure of protection against insolvency of the PBGC multiemployer insurance program by reducing the contingent liability against the program resulting from the billions of dollars in unfunded vested liabilities of poorly funded plans.

* * * *

[42] EFFECT OF DE MINIMIS ON WITHDRAWING EMPLOYERS

Analysis of 2,868 withdrawals from plans with unfunded vested benefits and required to apply the de minimis rule disclosed that about 87 percent of withdrawing employers had either no liability or a reduced liability.

Effect on employers	*Number of withdrawing employers*	*Percent of total*
Liability eliminated	2,024	70.6
Liability reduced	464	16.2
No change to liability	380	13.2
Total	2,868	100.0

Relief provided the 2,488 employers amounted to $36.1 million, or 65 percent of their total liabilities before de minimis offsets. The remaining 380 employers received no de minimis reduction from their $213 million in liabilities.

PBGC OPINION LETTER 82-8 (March 25, 1982)

Dear ————————:

This responds to your letter in which you requested our opinion as to the meaning of "the unfunded vested benefits attributable to employees of the employer" as used in Section 4225(a) of the Employee Retirement Income Security Act of 1974 ("ERISA") *as amended by* the Multiemployer Pension Plan Amendments Act of 1980 ("Multiemployer Act"). Specifically, you are concerned about interpretations to the effect that this amount is the same as determined under Section 4211 of ERISA to be "the amount of the unfunded vested benefit allocable to an employer . . . ." We conclude that the two amounts are not the same.

Section 4202 of ERISA requires, upon the withdrawal of an employer that the plan sponsor "determine the amount of the employer's withdrawal liability." Section 4201(b) of ERISA defines withdrawal liability as "the amount determined under Section 4211 to be the allocable amount of unfunded vested benefits, *adjusted* . . . in accordance with Section 4225." [Emphasis added.]

Section 4225(a) of ERISA provides a limitation on the withdrawal liability of an employer whose withdrawal from a multiemployer plan resulted from a "bona fide sale of all or substantially all of the employer's assets in an arm's-length transaction to an unrelated party." In this circumstance the employer's liability is limited to the greater of: (1) "a portion . . . of the liquidation or dissolution value of the employer" determined in accordance with a schedule of marginal rates ranging from 30% to 80% (Section 4225(a)(1)(A), (a)(2)); or (2) "the unfunded vested benefits attributable to employees of the employer." (Section 4225(a)(1)(B)).

The plain language of the statute makes it clear that "the unfunded vested benefits attributable to employees of the

employer" under Section 4225(a)(1)(B) is not identical to the amount of the unfunded vested benefits allocable to an employer under Section 4211. For example, even the "direct attribution" allocation method under Section 4211(c)(4) allocates to the employer a share of unfunded vested benefits which are not attributable to employees of the employer. Moreover, if the two amounts were identical, Section 4225(a) would be meaningless—it would never reduce liability below the amount allocated to the employer under Section 4211.

If the plan sponsor does not or cannot make the determination required under Section 4225(a)(1)(B), the employer's liability is limited to the amount determined in accordance with the schedule provided in Section 4225(a)(2). In any event, the plan sponsor is obligated to apply Section 4225(a), where appropriate. The failure to do so would be inconsistent with Title IV of ERISA, and would be reversible in the dispute resolution process under the Multiemployer Act.

I hope this adequately responds to your question. If you have further questions on this matter, please contact ———— of my staff at the above address or at ——.

Sincerely,

/s/ Henry Rose
HENRY ROSE
General Counsel

[Docket Item No. 9]

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 75 2037 DWW

JOHN L. CONNOLLY, C. V. HOLDER, HOWARD C. DENNIS, JOHN C. MAXWELL, JAMES J. KIRST, C. WILLIAM BURKE, KENNETH J. BOURGUIGNON, JOSEPH H. SEYMOUR, RICHARD L. CORBIT, HAROLD EDWARDS, DONALD E. MIER, WILLIAM C. WAGGONER, RICHARD GANNON and ALFRED HARRISON, each in his respective capacity as Trustee of the Operating Engineers Pension Trust,
Plaintiffs,

vs.

PENSION BENEFIT GUARANTY CORPORATION, a non-profit corporation established within the Department of Labor of the United States of America,
Defendant.

STIPULATION RE MOTION FOR SUMMARY JUDGMENT

IT IS HEREBY STIPULATED by and between the plaintiffs and defendant, each through its respective counsel, as follows:

* * * *

[Exhibit A to Stipulation]

AGREEMENT ESTABLISHING THE OPERATING ENGINEERS PENSION TRUST

THIS AGREEMENT made and entered into in the County of Los Angeles, State of California, this 13th day of December, 1960, by and between ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SOUTHERN CALIFORNIA CHAPTER; BUILDING CONTRACTORS ASSOCIATION OF CALIFORNIA, INC.; ENGINEERING AND GRADING CONTRACTORS ASSOCIATION, INC.; HOME BUILDERS ASSOCIATION OF LOS ANGELES, ORANGE AND VENTURA COUNTIES, successor to Home Builders Institute, Inc.; ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SAN DIEGO CHAPTER; SAN DIEGO BUILDING CONTRACTORS ASSOCIATION; ENGINEERING AND GRADING CONTRACTORS ASSOCIATION, INC., SAN DIEGO CHAPTER; ASSOCIATED GENERAL CONTRACTORS OF AMERICA, NEVADA CHAPTER; LAS VEGAS BUILDERS EXCHANGE; SOUTHERN NEVADA HOME BUILDERS, INC.; and FEDERATED EMPLOYERS OF NEVADA, INC., (hereinafter called "Employers"), and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 12 (hereinafter called "Union"), recites and provides as follows:

RECITALS

1. WHEREAS, the Employers and the Union are parties to Collective Bargaining Agreements which provide that each contractor covered by such agreements will make contributions to a Joint Pension Trust with respect to each hour worked (or paid) each employee covered by any of such agreements and employed by such contractor; and . . .

NOW, THEREFORE, IN CONSIDERATION OF THE FOREGOING AND OF THE MUTUAL PROMISES HEREINAFTER PROVIDED, the parties agree as follows: . . .

ARTICLE IX
GENERAL PROVISIONS

Section 1. Subject to the provisions of the Collective Bargaining Agreements, the rights and duties of all parties, including the Employers, the Signatory Associations, the Individual Employers, the Union, the Employees, Retired Employees and their beneficiaries, and the Trustees, shall be governed by the provisions of this Trust Agreement and the Pension Plan and any insurance policies or contracts procured or executed pursuant to this Trust Agreement.

. . . .

ARTICLE XI
AMENDMENT AND TERMINATION

Section 1. The provisions of this Trust Agreement may be amended or modified at any time, and from time to time, by mutual agreement of the Employers and the Union subject to the terms and conditions of the Collective Bargaining Agreements, any applicable law or regulation and the provision of Section 4 of this Article.

. . . .

BY THE COMPTROLLER GENERAL
REPORT TO THE CONGRESS
OF THE UNITED STATES

Effects Of The 1980 Multiemployer Pension Plan Amendments Act On Plan Participants' Benefits

The Multiemployer Pension Plan Amendments Act of 1980 changed federal requirements for funding and insuring the benefits of over 8 million participants in multiemployer defined benefit pension plans nationwide. A major change increased employers' liability for unfunded benefits when they withdrew from the plans.

GAO found that plan terminations increased from 27 in the 6 years before the act's passage to 66 in the 4 years after. According to plan officials, the act's employer liability changes contributed to the increases, but economic and other factors played a more significant role. Plan terminations after the act affected less than 1 percent of the participants nationwide. Most of those affected are to receive all benefits earned, and alternative pension coverage was made available for most of the participants still working.

Benefit practices of most of the 139 plans GAO sampled were changed after the act. According to plan officials, the act's employer liability provisions contributed to changes causing 12 percent of the 3.2 million sample plan participants to receive either no benefit increases after the act when they had been given benefit increases before or smaller increases than previously received. However, much higher percentages of the plans' participants were similarly affected or received greater benefit increases because of changes not related to the act.

GAO/HRD-85-58
JUNE 14, 1985

[16] * * *

However, officials of 10 of the 51 plans expressed concern that MPPAA had unfavorably affected the plans' collective bargaining process even though plan changes were favorable to participants. Officials at the 10 plans said that employers were generally more reluctant to negotiate benefit improvements because higher plan costs could result in higher employer withdrawal liability. An official of one of the plans said that the collective bargaining disagreement on plan changes had to be settled in arbitration.

Officials of the 27 plans that had changes only unfavorable to plan participants cited financial and nonfinancial reasons for the changes. Financial reasons most often cited were the funded status of the plans or general economic conditions (Sept. 1980 to May 1983). Although the specific nonfinancial factors cited as reasons for plan changes were usually related to unique aspects of individual plans, they generally reflected a management desire to not continue, at least at the same rate, benefit improvements.

Officials of the 13 plans that had changes both favorable and unfavorable to participants generally attributed changes to reasons similar to those cited by officials of the 78 plans discussed above. However, the reasons cited for individual changes generally reflected the plans' competing desires to (1) improve participants' benefits and (2) minimize plan costs. For [17] example, 8 of the 13 plans had multiple changes that were favorable to one participant group, such as working participants, and unfavorable to the other (retired participants). These plans often cited financial concerns for changes affecting one group and nonfinancial reasons for changes affecting the other. The other five plans cited primarily financial concerns as the reasons for multiple changes that favorably and unfavorably affected the same participant group (working participants).

MPPAA-RELATED CHANGES ATTRIBUTED TO WITHDRAWAL LIABILITY PROVISIONS

Officials of the 24 plans affected by MPPAA said that changes were made because of concern about the effects of the act's provisions governing withdrawing employers' liability for unfunded plan benefits. Although the provisions have a greater potential impact on some plans (such as those with unfunded benefits) than others (such as fully funded plans),[2] we found that they contributed to changes in both categories of plans.

Before MPPAA, employers withdrawing from a plan were not liable for a share of unfunded vested benefits unless the plan terminated within 5 years of their withdrawal. Also, liability was limited to 30 percent of the employers' net worth. MPPAA removed the net worth limitation and made each withdrawing employer, unless covered by special rules or relief provisions, liable for its allocated portion of a plan's unfunded benefits (general withdrawal rules). The special withdrawal liability rules, which generally apply to plans in the construction and entertainment industries, exempt withdrawing employers from liability unless they continue to work in the same geographic area without an obligation to contribute to the plan.

Officials of 17 of the 24 plans told us that benefit practices, affecting 264,000 participants, were changed so that increases in the plan's unfunded benefits, and therefore employers' withdrawal liability, could be minimized. Officials of the other seven plans that were fully funded said that changes, affecting 122,136 participants, were made to avoid unfunded benefits and the resulting potential withdrawal liability for employers.

. . . .

INVENTORY

OF

CONSTRUCTION INDUSTRY

MULTIEMPLOYER PENSION PLANS

[SEAL OMITTED IN PRINTING]

Associated General Contractors of America
1957 E St. NW
Washington, D.C. 20006

[p. 1] AGC PENSION PLAN INVENTORY

February 1983

INTRODUCTION

With the enactment of the Multiemployer Pension Plan Amendments Act of 1980, it became essential that contractors be aware of, and take an active interest in, the financial health of multiemployer pension plans. The current level of unfunded vested liability (UVL) as well as the upward or downward trend of liability are particularly important pieces of information.

This need for more and better data led AGC to undertake an inventory of construction industry multiemployer pension plans. Under the guidance of the ERISA Task Force, AGC has been attempting to gather information on as many of the more than 1,000 construction industry plans (according to PBGC) as possible.

This report represents a vastly expanded version of AGC's interim report of almost 200 construction industry multiemployer pension plans that was released in July, 1982 (see Fringe Benefit Bulletin #18-82). This current report contains information on over 650 plans that contractors contribute to. While this survey does not include all of the construction industry related multiemployer plans, it does include most of the larger plans and appears to provide a fairly representative sample of construction industry multiemployer pension plans.

* * * *

[p.3]

UNFUNDED VESTED LIABILITY [UVL] (419 Plans)

Attachment A represents individual plan data on plan assets, unfunded vested liability (UVL), the ratio of plan assets to vested benefits, and yearly contributions. An analysis of the level of UVL maintained by each plan reveals a wide swing with a high of $3.57 billion to no

UVL and all variations in between. Of 419 plans providing information on the level of UVL, a surprising 204 or 48.7 percent had no UVL. This still leaves 51.3 percent of survey plans with UVL and, in many cases, potentially large employer withdrawal liability. It should be noted, however, that much of the UVL data is for 1978 or 1979. Since that time, management trustees have become more active in plan administration and many plans have gone to great lengths to improve funding. This effort should increase the number of plans that are well-funded.

[p. 6]

* * * *

Conclusion

There are few definite conclusions that can be drawn in the aggregate from AGC's pension plan inventory effort excepting that the funding levels of plans vary widely without any apparent pattern. There can be no doubt, although more plans are better funded than we first expected, that unfunded vested liability and potential employer withdrawal liability are still a serious problem for our industry. Contractors involved with plans which are less well-funded should work to improve funding either at the bargaining table or through the plan trustees. Various options are available including an agreement to divert a portion of plan contributions to reduce UVL or an agreement to cap benefits until funding reaches a certain level. Contractors involved with well-funded or fully-funded plans should consider trust or collective bargaining agreement language perventing [sic] any slippage in the funding level. Conversion to a defined-contribution plan should also be reviewed. Defined-contribution plans specifically limit an employer's liability to his agreed-to per hour contributions and also provide significant advantages to construction workers in regards to portability and vesting.

Dan Knise